



National Energy Board

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Frequently Asked Questions (FAQs) about Fair Market Access

1. What is Fair Market Access?

Paragraph 119.06 (2)(c) of the *National Energy Board Act* (NEB Act) requires that the Board consider whether an applicant for an electricity export permit has:

- i. informed those who have declared an interest in buying electricity for consumption in Canada of the quantities and classes of service available for sale; and
- ii. given an opportunity to purchase electricity on terms and conditions as favourable as the terms and conditions specified in the application to those who, within a reasonable time after being so informed, demonstrate an intention to buy electricity for consumption in Canada.

These requirements are referred to as fair market access (FMA). FMA is considered, along with other criteria, in determining whether to recommend to the Minister of Natural Resources that an application be designated for a licensing procedure, which would involve a public hearing.

2. How does the NEB consider FMA requirements?

The Board receives two types of electricity export applications for which FMA is relevant. Contract specific applications are those applications in which an applicant is able to specify the terms and conditions of the proposed exportation of electricity, usually through providing the proposed export contract. Another type of application the Board receives is referred to as a "blanket" export application whereby applicants request an export permit without having pre-negotiated export contracts in place. The assessment of FMA varies based on the type of application submitted.

Paragraph 9(q) of the *National Energy Board Electricity Regulations* (SOR/97-130) (Electricity Regulations) requires that applicants provide a description detailing the manner in which FMA was provided to persons who have demonstrated an interest in buying electricity for consumption in Canada. When contract specific applications are received, the information filed in support of FMA is assessed during the application examination process.

Paragraph 9(r) of the Electricity Regulations requires that applicants describe the manner in which they will provide FMA to persons who have demonstrated an interest in buying electricity for consumption in Canada if the application does not specify the terms and conditions of the proposed exportation. Since FMA cannot be assessed at the time of application for a blanket electricity export permit, as no contracts are yet in place, the Board developed a standard condition that obligates exporters to provide FMA throughout the term of the permit.

3. Who is eligible to be provided FMA?

Domestic buyers refers to parties purchasing electricity for consumption in Canada. All domestic buyers are eligible to be provided FMA as long as such buyers have access to the transmission system within Canada and have the legal ability to effect a purchase^[1]. The granting of the legal ability to purchase electricity from the wholesale electricity markets for domestic consumption is a matter within provincial jurisdiction.

[1] To view a Board decision [\[Filing A21698\]](#) that includes discussion on FMA eligibility, see the decision regarding the 13 December 1995 application by British Columbia Power Exchange Corporation available on the Board's website.

4. What types of exports require FMA?

Exporters are required to provide FMA to prospective domestic buyers for sales transfers only. The following are other types of export related activities that do not require FMA:

- Border accommodations are limited volume sales to parties in the United States who lack access to services from the U.S. power system, or to works that are located in part in Canada and in part in the United States;
- Equichange and storage transfers do not involve a net export to the United States; and
- Adjustment and carrier transfers are limited to those parties that offer transmission services to exporters. These types of transfers are the result of physical and interconnected system operations and are not sales transfers.

5. What procedures should exporters use to provide FMA?

The Board has not been prescriptive in determining the procedures for providing FMA. FMA entails certain responsibilities for the domestic buyer and certain responsibilities for the exporter. Exporters must ensure that potential domestic buyers are kept informed about the electricity available for sale to external markets. The domestic buyer must demonstrate a serious intent to purchase by, for example, telling the exporter the class of service it is interested in buying, the quantities it is interested in buying, and the period of the proposed purchase. The onus is on both the exporter and the domestic buyer to keep each other informed about intentions to sell and purchase electricity and to bargain in good faith.

FMA procedures would be expected to vary based on the circumstances surrounding the proposed sale such as: the dynamics of the electricity market and market participants; the sales contract term length; volumes available; and whether the electricity available is interruptible or firm. For example, the marketing approach taken to satisfy FMA requirements when offering interruptible one-day energy for sale would likely differ from the marketing approach taken when offering 20-year firm energy for sale. It is important to note that the provision of adequate time for negotiation^[2] is an integral part of FMA. In essence, during the energy marketing process, when a domestic buyer is interested in buying electricity and has demonstrated a willingness to negotiate the purchase of a class of service that is similar to that being considered by an exporter for sale to an export customer, then the exporter should ensure that the domestic buyer has an opportunity to negotiate terms and conditions (including price) no less favourable than those being offered to export customers.

[2] To view a Board decision [\[Folder 94293\]](#) that discusses adequate time for negotiation, see the decision regarding the 14 March 1991 application by The Manitoba Hydro Electric Board available on the Board's website.

6. Do domestic buyers have a right of first refusal?

The requirement to provide FMA does not oblige an applicant to carry out any specific procedure such as allowing interception of its proposed exports^[3]. Rather it is the existence of an equal opportunity and an onus on both parties to negotiate in good faith that are the essential elements of FMA.

[3] See Board decision [\[Folder 94300\]](#) regarding 27 August 1991 application by The Manitoba Hydro Electric Board available on the Board's website.

7. How can a domestic buyer assess whether FMA was provided?

There are a number of mechanisms to gain knowledge of electricity sales within a province and in adjacent electricity markets.

There is a significant amount of information regarding electricity exports available to the public. The NEB publishes monthly export statistics on its website as well as offering a number of publications on Canadian electricity markets. Many provincial and American bodies publish detailed information on their respective local electricity markets. In addition, some electricity markets have standard power purchase agreements and electronic trading platforms available.

If a party is concerned that FMA was not provided in a particular case, it may request that the Board require the exporter to provide access to the specific export sales contract. Examining an export sales contract may provide a domestic buyer with the necessary information to make arguments with respect to their ability to purchase electricity in Canada on terms and conditions similar to those of proposed exports. Should a request be made to the Secretary of the Board to examine an electricity export contract, the contract will be treated in a manner consistent with the Board's legal obligations pursuant to the *Access to Information Act*^[4].

[4] See question #9 for further information.

8. If a domestic buyer feels it was not provided FMA, what recourse is available?

They can notify the Secretary of the Board of their concerns in writing and an appropriate process will be determined to inquire into the matter. There are two points at which a complaint could be received:

1. If the complaint is received during an export application process for a contract specific export permit, the Board will consider the evidence and determine whether it should issue an export permit or recommend to the Minister that the application be designated for a licensing procedure in which case, a public hearing into the matter would be held.
2. If the complaint is received after a blanket export permit has been issued, the Board will investigate whether the permit holder is in non-compliance with the condition that requires it to provide FMA to domestic buyers. Section 119.093 of the NEB Act allows the Board to revoke or suspend an export permit when the permit holder has contravened or failed to comply with a term or condition.

9. Can export contracts be filed in confidence with the Board?

All applications are public and are filed on the NEB website unless accompanied by a request for an order of confidentiality under Section 16.1 of the NEB Act.

For contract specific permit applications, paragraph 9(g) of the Electricity Regulations requires applicants to file a copy of any electricity transfer agreement that covers the proposed exportation of electricity. If an exporter wishes to file an export contract in confidence, it should request confidentiality under Section 16.1 of the NEB Act and provide the reasons why the contract should be kept confidential. The Board may also set up a process asking for comments from others who may have a view on whether a Section 16.1 order should be granted. After considering all comments, the Board would make its decision on whether or not to issue such an order.

For blanket electricity export permits, electricity transfer agreements are not included in the application as they are not yet in place. As a consequence, a condition is placed on the export permit that requires certain sales contracts to be filed after they are executed. As a matter of practice, contracts are not placed on the NEB website. Should there be a request from a third party seeking access to examine the export contract(s), it will be treated in a manner consistent with the Board's legal obligations pursuant to the *Access to Information Act*. The exporter involved will be provided the opportunity to make submissions prior to disclosure of the contract(s). Such submissions could relate to the need to keep the contracts, or certain aspects of the contracts, confidential from third parties.

10. If I wanted to learn more about FMA, what past Board decisions could I review?

The Board has issued over 300 permits since the NEB Act was changed to incorporate the 1988 Canadian Electricity Policy including the concept of FMA. While the following list is not exhaustive, it represents a number of applications or decisions in which FMA matters were discussed at length:

Contract Specific Electricity Export Applications:

- EPE-33 to EPE-35, Manitoba Hydro Electric Board, June 1992 [[Filing A21362](#)]
- EPE-41 to EPE-44, BC Hydro and Power Authority and BC Powerex, December 1992 [[Folder 94175](#)]

- EPE-45 and EPE-46, Manitoba Hydro Electric Board, February 1993 [[Folder 94300](#)]
- EPE-52, Manitoba Hydro Electric Board, 10 December 1993 [[Filing A21694](#)]
- EPE-92, BC Powerex, 13 September 1996 [[Filing A21698](#)]
- EPE-224, Manitoba Hydro Electric Board, 23 January 2003 [[Filing A20410](#)]

Blanket Electricity Export Applications:

- EPE-64 and EPE-65, Hydro Quebec, December 1994 [[Folder 94260](#)]
- EPE-116 to EPE-119, BC Powerex, 1 October 1998 [[Filing A21725](#)]
- EPE-129 and EPE-130, Marketing D'Energie HQ Inc., 8 April 1999 [[Filing A21781](#)]

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